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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

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# No. 676

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UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON, Petitioner,

*vs.*

RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. MOORE, Commissioner of the General Land Office.

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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HOMER HENDRICKS,
DONALD V. HUNTER,
JAMES C. SHEPPARD,
*Counsel for Petitioner.*

(35,598)

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UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON, Petitioner,

*vs.*

RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. MOORE, Commissioner of the General Land Office.

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## PETITION FOR WRIT OF CERTIORARI.

---

May it please the Court:

Your petitioner, H. H. Simpson, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia, entered on December 1, 1930 (R. 28), in the cause entitled "Ray Lyman Wilbur, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office," being cause No. 5251 on the docket of said Court and

reversing the judgment of the Supreme Court of the District of Columbia (R. 22).

## I.

### Summary Statement of the Matter Involved.

This case involves the validity of the action of the Secretary of the Interior in suspending the execution of Section 13 of the Act of February 25, 1920 (41 Stat. 437, Ch. 85), hereinafter called the "Oil Leasing Act," entitled "An Act *to promote* the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain." Sec. 13 authorizes the Secretary—

> "To grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil and gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field * * *."

On May 25, 1929, the petitioner filed in the District Land Office at Sacramento, California, two applications for permits to prospect for oil and gas, pursuant to the provisions of Sec. 13 of the aforesaid Act, upon certain open and unappropriated public lands of the United States, and on June 6, 1929, filed in said Office a third similar application for other open and unappropriated public lands (Pars. 1, 19, and 29 of Petition, R. 2, 5, and 6; admitted in Pars. 1, 19, and 29 of Answer, R. 13, 15).

Requisite filing fees were tendered with each of these applications (Pars. 5, 23, and 33 of Petition, R. 2, 5, and 7; Pars. 5, 23, and 33 of Answer, R. 14, 15, and 15-16).

The applications were in the form prescribed by the Regulations (Circular 672, 47 L. D. 437) promulgated under the provisions of the Oil Leasing Act. (Pars. 2, 20, and 30 of Petition, R. 2, 5, and 7; admitted in Pars. 2, 20, and 30 of Answer, R. 14, 15), and the averments therein, if true, were such as to entitle the petitioner to permits to prospect for oil and gas upon the areas therein described.

The Register of the Sacramento Land Office, by letters dated May 27 and June 7, 1930, rejected petitioner's applications and returned the filing fees, for the sole reason that the Secretary, by order of March 20, 1929, had directed as follows:

> "Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits." (Pars. 8, 26, and 36 of Petition, R. 3, 5-6, 7-8; admitted in Pars. 8, 26, and 36 of Answer, R. 14, 15, and 16).

Appeals from the Register's action in refusing to receive petitioner's applications were duly prosecuted before the Secretary, who affirmed the action of the Register and has at all times since refused to receive and act upon them. (Pars. 11, 27, and 37 of Petition, R. 3-4, 6, and 8; admitted in Pars. 11, 27, and 37 of Answer, R. 14, 15, and 16).

The petitioner, having exhausted his remedies before the Interior Department, filed suit in the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary of the Interior and the Commissioner of the General Land Office to accept for filing his said applications and to pass upon the merits thereof as provided by Sec. 13 of the Oil Leasing Act (R. 1-13). The Secretary and the Commissioner filed an answer (R. 13-20), to which the petitioner demurred (R. 21). The Supreme Court of the District of Columbia sustained the petitioner's demurrer to the answer (R. 21), and ordered the issuance of a writ of mandamus requiring the Secretary to accept for filing the said applications, and directing the Secretary to proceed therewith according to law (R. 22).

The Secretary and the Commissioner appealed to the Court of Appeals of the District of Columbia, where the case was subsequently submitted and argued with a group of other cases involving similar issues of law (R. 25-26), and on December 1, 1930, the Court of Appeals handed down a majority opinion (R. 27, 29-37), reversing the judgment of the trial court, to which Mr. Justice Van Orsdel dissented and filed a separate opinion (R. 27, 37-42).

In the courts below the Secretary assigned two reasons for refusing to receive and act upon the said applications—

(1) That under Sec. 13 of the Oil Leasing Act, he is vested with discretion as to whether or not he will

receive and consider on their merits any such applications whatever (Par. 40 of Answer, R. 16); and

(2) That his suspension of the execution of Sec. 13 was because of an oil conservation policy alleged to have been "informally" proclaimed by the President and put into effect by the Secretary, the latter claiming that the "effect" of the Secretary's action "was to cause all public lands containing oil to be temporarily withdrawn from all exploration for oil and gas" under the said Act (Par. 41 of Answer, R. 17).

The steps taken, which were claimed by the Secretary to have constituted, in effect, a withdrawal of all lands subject to prospecting operations under Sec. 13 of the Oil Leasing Act, were:

On March 12, 1929 a press notice is alleged to have emanated from the President as follows:

> "There will be no leases or disposal of Government oil lands, no matter what category they may lie in, of Government holdings or Government controls, *except those which may be mandatory by Congress.* In other words, there will be complete conservation of Government oil in this Administration" (R. 38). (Our italics.)

On March 13, 1929 (without, so far as the record shows or has ever been disclosed, any instructions from the President), the Secretary caused the following telegram to be sent to the Registers of all Public Land Officers:

> "No oil and gas prospecting permits will be issued on and after March twelfth, nineteen

twenty nine. Reject all applications for oil and gas permits now pending in your office and receive no more. All orders for drawings hereby revoked" (R. 30).

Thereafter, the Secretary issued Departmental Orders Nos. 337 and 338, the material parts of which are:

Departmental Order No. 337, dated March 16, 1929:

"The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department.

"There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications.

* * * * * * * *

"Where land covered by pending applications is likely to be drained by adjoining wells on privately-owned lands, the question of granting permits on Government land will be considered in the light of facts developed by departmental investigation.

"With regard to the 20,000 outstanding permits on public lands, the Department will deal fairly with holders who have been diligent in maintaining their equities. Where actual drilling operations have been started and are being continued, opportunity will be given to carry

on developmental work to finally determine the character of the land. Immediate steps will be taken, however, to cancel all such permits where no drilling has been done or money spent in development.

* * * * * * *

"Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. This includes so-called group developments heretofore approved and in which extensions have been allowed, where permittees are engaged in a joint drilling program, test wells being drilled by a responsible drilling company on some of the public lands in the area covered by the permits. So long as this program is being diligently prosecuted, no adverse action will be taken.

"No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929" (R. 18-19).

Departmental Order No. 338, dated March 20, 1929:

"The following outlines the general procedure in the Department of the Interior for exe-

cuting the President's public land oil conservation policy;

* * * * * * *

"4. Oil and gas permits now in good standing will not be proceeded against so long as the terms of the permits are being timely complied with.

"5. Where a permittee is entitled to a lease because of discovery, it is mandatory to lease only one-fourth of the area, under strict interpretation of the President's oil policy, except that when the permit covers 160 acres or less, the permittee would be entitled to lease the full acreage. The remainder will not be leased unless such action is required in the public interest.

* * * * * * *

"7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

* * * * * * *

"12. The Geological Survey will report to the Secretary on the likelihood of oil and gas drainage of Government lands in various producing and wild-catting fields where a claim of drainage is made. The special committee will consider the question of drainage only when incidentally involved in individual permits before it for consideration" (R. 19-20).

Neither of said orders withdrew any lands from public entry, nor purported to do so. No other orders have been subsequently issued.

The President has made no direct public statement, proclamation, or order, nor has he executed any document in respect to these matters.

## II.

### Reasons Relied on for the Allowance of the Writ.

1. THE COURT OF APPEALS HAS DECIDED A QUESTION OF GENERAL IMPORTANCE AND OF SUBSTANCE RELATING TO THE CONSTRUCTION OF STATUTES OF THE UNITED STATES WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

As hereinbefore indicated, this case involves the validity of the Secretary's action in suspending the execution of Sec. 13 of the Oil Leasing Act (41 Stat. 437, Ch. 85), which authorizes him to receive and consider on their merits applications for permits to prospect for oil and gas upon the public domain. The Secretary's action has deprived many citizens of valuable rights expressly granted to them by Congress. The operation of Sec. 13 has been altogether suspended as regards the receiving of new applications for prospecting permits. The primary purpose of Congress in passing the said Act "to promote the mining of * * * oil * * * on the public domain" has been nullified.

This case further involves the question whether an informal press notice constitutes a withdrawal by the

President under the Withdrawal Act of June 25, 1910 (36 Stat. 847, Ch. 421) which places the responsibility for withdrawals on him, and, generally, what constitutes a valid "withdrawal" of public lands from "settlement, location, sale or entry," and whether withdrawals, if valid, must be in compliance with said Act.

None of these questions has been settled by this Court, and the public and governmental interest in them is such that they should be settled here.

2. THE COURT OF APPEALS HAS NOT GIVEN PROPER EFFECT TO THE APPLICABLE DECISIONS OF THIS COURT.

The majority of the Court of Appeals found this case controlled by the decisions of this Court in *United States v. Midwest Oil Company*, 236 U. S. 459; *Wilcox v. Jackson*, 13 Pet. 498, and *Wolsey v. Chapman*, 101 U. S. 755, notwithstanding that none of them related to withdrawals made after the enactment of the Withdrawal Act of June 25, 1910, and notwithstanding that there was involved in each of them withdrawals of specified lands, whereas in the instant case all that was done was to direct that execution of part of the Oil Leasing Act be suspended. The principles which, it is urged, should govern are those stated by this Court in *Work v. United States ex Rel. Mosier*, 261 U. S. 351, in which it was held that it is the duty of the Secretary to administer acts of Congress as he finds them, and not as he thinks they ought to be in view of what is, in his opinion, a change of conditions since Congress acted.

WHEREFORE it is respectfully urged that this petition for a writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia be granted; that said judgment may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as may seem just and proper.

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OCTOBER TERM, 1930.

No. 676.

UNITED STATES OF AMERICA, EX REL. H. H. SIMPSON,
*Petitioner,*
*v.*
RAY LYMAN WILBUR, Secretary of the Interior, and CHARLES C. MOORE, Commissioner of the General Land Office.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HOMER HENDRICKS,
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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### Opinion of the Court of Appeals.

The opinion of the Court of Appeals in this case has not yet been officially reported. It was delivered on December 1, 1930, and appears at pages 27-28, 29-42 of the Record.

## II.

### Jurisdiction.

The date of the judgment to be reviewed is December 1, 1930 (R. 28). The petition for certiorari was filed in this Court on January 22, 1931, and authority to hear the same is conferred by Sec. 240 of the Judicial Code as amended by Sec. 1 of the Act of Feb. 13, 1925 (43 Stat. 936, 938).

## III.

### Statement of the Case.

A full statement of the case has been given in the Petition (pp. 2-9).

## IV.

### Specification of Errors to be Urged.

1. The Court of Appeals erred in failing to hold that Sec. 13 of the Act of Feb. 25, 1920 (hereinafter called the "Oil Leasing Act"), Ch. 85, 41 Stat. 437, vests the Secretary with jurisdiction to receive and consider on their merits applications for oil and gas prospecting permits, which he may not refuse to exercise.

2. The Court of Appeals erred in holding that the several steps alleged to have been taken by the Secretary constituted, in effect, a withdrawal of all public lands from exploration of oil and gas.

3. The Court of Appeals erred in holding that the petitioner was not entitled to a writ of mandamus compelling the Secretary to receive and pass upon petitioner's applications and otherwise to perform the duties delegated to him in Sec. 13 of the Oil Leasing Act.

## V.

## Argument.

### *Summary.*

Sec. 13 of the Oil Leasing Act requires the Secretary to receive and consider on their merits, applications for prospecting permits, and he is without authority to suspend the execution of the law.

The majority of the Judges of the Court of Appeals were in error in upholding the Secretary's claim that there was a withdrawal "in effect," because his Orders were not intended to, and did not in effect result in a withdrawal of public lands; and further, because his Orders were not in compliance with the Withdrawal Act of June 25, 1910 (Ch. 421, 36 Stat. 847), and were therefore ineffective as valid withdrawals. As to this, the majority of the Judges of the Court of Appeals misconstrued the opinions of this Court in *United States v. Midwest Oil Co.*, 236 U. S. 459, *Wilcox v. Jackson*, 13 Pet. 598, and *Wolsey v. Chapman*, 101 U. S. 755.

The trial court properly issued a writ of mandamus under the facts of this case, because the Oil Leasing Act was passed to and does grant rights to qualified applicants for prospecting permits, and because the writ only required the Secretary to take jurisdiction of administrative matters imposed upon him by law.

### *Statutes Involved.*

*Oil Leasing Act (Ch. 85, 41 Stat. 437):*

"An Act To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.

"*Be it enacted by the Senate and House of*

*Representatives of the United States of America in Congress assembled,* That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities * * *."

* * * * * * * * *

"OIL AND GAS

"SEC. 13. That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations, as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of permit drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered,

and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered."

* * * * * * * *

"SEC. 14. That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit."

* * * * * * * *

"SEC. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act."

* * * * * * * *

"SEC. 35. That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this Act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the

State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct. * * *"

*Withdrawal Act of June 25, 1910* (Ch. 421, 36 Stat. 847):

"An Act to authorize the President of the United States to make withdrawals of public lands in certain cases.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States, including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

* * * * * * * * *

"Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals." (This Act now appears with slight changes, as Secs. 141-143, Title 43, U. S. Code.)

1. SEC. 13 OF THE OIL LEASING ACT REQUIRES THE SECRETARY TO RECEIVE AND CONSIDER ON THEIR MERITS, APPLICATIONS FOR PROSPECTING PERMITS, AND HE IS WITHOUT AUTHORITY TO SUSPEND THE EXECUTION OF THE LAW.

The Oil Leasing Act is by its title—

> "An Act *to promote* the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain."

Sec. 1 declares the intention of Congress to be—

> "That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States ..... *shall be subject to disposition* in the form and manner provided by this Act. ....."

These general provisions are mandatory and show that Congress was issuing directions to the end that the fullest development of mineral resources owned by the United States should be encouraged.

Sec. 13 of the Act provides that the Secretary—

> "is hereby authorized, under such necessary and proper rules and regulations as he may prescribe to grant to any applicant qualified under this Act a prospecting permit. ...."

The foregoing authorization is not, as the Secretary has assumed in these proceedings, a grant of jurisdiction which he may or may not exercise as he sees fit. On the contrary, the Act grants valuable rights to citizens of the United States, and contem-

plates that when citizens tender applications in the exercise of such rights, the Secretary shall discharge the duty imposed upon him of granting the application, if in conformity with the law and the "necessary and proper rules and regulations" prescribed by him. The Secretary in this case has refused even to consider the applications of petitioner.

The use of the word "authorized" is apt and appropriate, not, as the Secretary has supposed, to leave the matter of execution or suspension of the law to his judgment, but as limiting the extent to which he may go in granting the permits provided for by the Act. Thus, the Secretary is authorized to grant prospecting permits, subject to such limitations as appear in the Act. These limitations go to the citizenship of the applicant (Sec. 1), and to the period of time during which the permit is to run ("not exceeding two years"), the amount of land to be included in each permit ("not to exceed two thousand, five hundred and sixty acres"), the kind of lands to be embraced in the permit ("not within any known geological structure of a producing oil or gas field"), and the amount of drilling which each permittee shall be required to do in order to retain his permit (Sec. 13). The "authorization" does not in terms give the Secretary authority to decide whether or not any permits at all will issue under Sec. 13, and Congress cannot reasonably be presumed to have laid down limits of jurisdiction, without intending that such jurisdiction, when invoked by proper parties, should be exercised.

The legislative history of this Act is well known. The project of leasing lands bearing non-metalliferous minerals, instead of parting with title thereto, as

theretofore provided by the general mining laws (See Act of Feb. 11, 1897, Ch. 216, 29 Stat. 526), was before Congress for some ten years prior to the Act of Feb. 25, 1920. The previously existing situation was frequently referred to in the debates in the Senate and House of Representatives at the time of consideration of the Oil Leasing Act. These debates conclusively show that Congress took affirmative action to stimulate the development of mineral resources in the public lands of the Western States, and intended to give the greatest encouragement to persons who would spend their time and money in prospecting for oil (see, especially, Vol. 58, Congressional Record, pages 4112, 4268, 4270-4273, and 7537). In this connection, Senator Smoot, the author of the Bill, stated as follows:

> "Mr. President, there are withdrawn from all development 6,500,000 acres of the public domain supposed to contain oil, or, in other words, designated as oil lands. There are 2,700,000 acres of phosphate lands withdrawn in the same way. There are 3,500,000 acres of oil-shale lands that have already been classified. There are 43,700,000 acres of coal lands withdrawn, and of those 43,700,000 acres the Government up to the present time has classified as coal lands only 27,300,000 acres. That vast acreage of the public domain, all situated in the western part of our country, has been tied up for years, preventing any form of development. No development upon these lands can be made today. The time has come, in the opinion of the Committee on Public Lands, that legislation must be passed in order that these great undeveloped resources of our country shall be made use of by the American people.

> "When I was told 12 years ago that such withdrawals would be made, and that no development upon these lands should be allowed until the Western Senators had agreed to a leasing system, I doubted at that time whether the program would be carried out. It has been carried out, and today we find that there is an actual scarcity of some of the minerals enumerated in the pending bill. I say now that unless there is a change in policy and the development of the lands for the minerals begins at an early time it will cost the American people millions of dollars and perhaps the loss of a great portion of their foreign commerce." (58 Cong. Rec. p. 4112.)

The House Committee on Public Lands in favorably reporting the Bill, which became the Oil Leasing Act, said:

> "Your committee believes that the present draft represents an improvement on all previous bills, and that if enacted into law will promote the prospecting and development of the mineral deposits in the public lands with due protection to the public interest." (House Report No. 398, 66th Cong., 1st Sess., page 18.)

Previous to the Secretary's Orders of March, 1929, involved in this case, the Interior Department had continuously administered the Act upon the theory that it was intended to *promote* and encourage the discovery of new oil fields (see, Par. 3, p. 8, of the Regulations concerning Oil and Gas Permits, Circular No. 672, 47 L. D. 437; *Enlow v. Shaw*, 50 L. D. 339; and Instructions of June 3, 1924, 50 L. D. 546). The only cases in which discretionary power to reject permit applications has been exercised, were those in which the lands involved were not of the

kind which Congress intended should be subject to prospecting when it passed the Act. (Compare, *Wilmer Jeanette*, 47 L. D. 582, *Martin Wolfe*, 49 L. D. 625, *J. D. Mell*, 50 L. D. 308, *Neal v. Newton et al.*, 51 L. D. 477, and *Chas. West*, 50 L. D. 534).

The majority opinion of the Court of Appeals is not based on the Secretary's claimed discretionary power to suspend the execution of Sec. 13 of the Oil Leasing Act. Indeed, that court could not well have adopted such a position in view of its decision in the case of *West v. United States ex rel. Alling*, 58 App. D. C. 329, 30 F. (2d) 739, in which mandamus to compel the issuance of an oil prospecting permit was sustained, the court saying:

> "It will be observed that the act, in section 1, expressly provides for the disposition of oil and gas lands through prospecting permits and subsequent leasing 'to citizens of the United States', and the power vested in the Secretary to establish rules and regulations for the carrying out of the act does not imply the power to establish a rule or regulation that will conflict with an express provision of the act. It follows, we think, that if the applicant sufficiently qualifies as a citizen of the United States, the Secretary is powerless to refuse such applicant a permit or to make any rule of regulation that interferes with the right of such applicant."

Nor can it be reasonably inferred that Congress, having "authorized" the granting of prospecting permits, gave the Secretary *carte-blanche* to substitute a policy of discouragement of all development in lieu of the policy expressed by Congress in the Act to *promote* such development. On the contrary,

Congress has by subsequent legislation unmistakably indicated its purpose to keep control of the development of new oil fields by prospecting permits, by enacting from time to time amendments to Sec. 13 of the Oil Leasing Act, extending the time within which permittees may begin or complete drilling operations (see the *Act of Jan. 11, 1922,* Ch. 28, 42 Stat. 356; *Act of Apr. 5, 1926,* Ch. 107, 44 Stat. 236; *Act of March 9, 1928,* Ch. 163, 45 Stat. 252; and *Act of Jan. 23, 1930,* Ch. 25, 46 Stat. ).

We submit that the Oil Leasing Act gives the Secretary no authority to decide that he will no longer issue permits under Sec. 13, and that the Supreme Court of the District of Columbia, and Mr. Justice Van Orsdel in his dissenting opinion in the Court of Appeals (R. 37-42), properly concluded that the writ of mandamus should issue to compel the Secretary to perform his statutory duties.

2. THE COURT OF APPEALS ERRED IN SUSTAINING THE SECRETARY'S CLAIM OF "WITHDRAWAL IN EFFECT"—

(1) Because His Orders Were Not Intended to, and Did Not in Effect, Result in a Withdrawal of Public Lands; and

(2) Because His Orders Were Not in Compliance With the Withdrawal Act of June 25, 1910, and Were Therefore Ineffective as Valid Withdrawals.

The practice of withdrawing portions of the public domain from disposal under acts of Congress, for special public uses, is one of long standing. The

long-established practice has been to promulgate orders designating as "withdrawn" or "reserved" areas of land described with particularity in the orders. The method consistently used in making withdrawals is plainly shown in United States Geological Survey Bulletin No. 623, entitled "Petroleum Withdrawals and Restorations Affecting the Public Domain." A typical withdrawal order taken from this compilation is printed in the Appendix to this brief. This compilation of withdrawal orders indicates that every withdrawal order made after the enactment of the Act of June 25, 1910, was made in the form prescribed by that Act, and was signed by the President.

Prior to 1910 these withdrawals or reservations were made without express authority from Congress. By the Withdrawal Act of June 25, 1910 (Ch. 421, 36 Stat. 847), however, Congress delegated to the President express authority to make withdrawals "in certain cases." This Act reads in part as follows:

> "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States, including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.
>
> * * * * * * * * *

"Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals." (This Act now appears with slight changes, as Secs. 141-143, Title 43, U. S. Code.)

Under this Act the following matters seem essential to a valid withdrawal:

(1) The withdrawals shall be made by the President;
(2) A specific order of withdrawal is required;
(3) The orders of withdrawal shall specify the purposes for which the lands are withdrawn;
(4) The purpose of the withdrawal must be limited to the reservation of public lands, for water-power sites, irrigation, classification of lands, or other public purposes;
(5) The Secretary of the Interior shall report such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

This Act had been in effect almost nineteen years when the several acts of the President and the Secretary, now asserted to have been a withdrawal "in effect", were had, and the instant and related cases are the only ones, so far as has been shown, or as counsel can find, in which decision to suspend the operation of a public land statute has been made by the Secretary. Certainly this is the first case in which such action has been either claimed or held to constitute "in effect" an exercise of the power granted by Congress to withdraw or reserve public lands.

What is offered as a withdrawal in this case?

Soon after taking office, the President is alleged to

have released an informal press notice, on March 12, 1929, in which he is reported to have said:

> "There will be no leases or disposal of Government oil lands, no matter what category they may lie in, of Government holdings, or Government controls, *except those which may be mandatory by Congress.* In other words, there will be complete conservation of Government oil in this Administration." (R. 38; our italics.)

As was pointed out by Mr. Justice Van Orsdel in the Court below—

> "It will be observed that this merely purports to state a future policy which the President might or might not adopt in respect to government oil lands." (R. 38.)

The President gave no orders to anyone.

The Secretary, however, caused telegrams to be sent to the Registers of all Public Land Offices, directing them to reject all applications for oil and gas prospecting permits and to receive no more applications (R. 30). These instructions were followed by two formal orders to the same effect (R. 18-20), which were declared to be for the purpose of making effective the President's oil conservation policy. These orders, originating with the Secretary and executed by him without any instructions from the President, were plainly issued on the ground that the Secretary believed that Sec. 13 of the Oil Leasing Act gave him authority to suspend the execution of the law. It seems perfectly apparent that they were not intended to be withdrawals. The President had stated that government oil lands would not be disposed of except

where mandatory, and the Secretary mistakenly assumed that the issuance of prospecting permits had not been made mandatory by Congress.

No orders of withdrawal were issued; no lands were indicated as withdrawn; and no report of what is now claimed to have been a withdrawal has ever been made to Congress. Nothing whatever was done which bore any resemblance to a withdrawal under the Act of June 25, 1910, or under the practice existing before the passage of that Act. Indeed, the orders of the Secretary made provision for the issuance of permits in some cases and non-issuance in others, and for leases which were mandatory under the law, and even now, the Secretary does not assert that any actual withdrawal has ever occurred, but merely that the "effect" of his action "was to cause all public lands containing oil to be temporarily withdrawn from all exploration of oil and gas." (Par. 41 of Answer, R. 17.)

The majority of the Judges of the Court of Appeals were of opinion that the action taken by the Secretary in this case was a valid exercise of powers recognized by this Court in the case of *United States v. Midwest Oil Co.*, 236 U. S. 549. In so doing the majority clearly extended this Court's decision far beyond anything actually decided therein, and beyond any implications involved in this Court's opinion.

The *Midwest* case arose as a result of formal withdrawals made prior to 1910, by the President, of large areas of public lands, in order that Congress might pass legislation providing for a method of disposal of oil lands different from the method then in effect. Thereafter, the defendant oil company went upon certain of the withdrawn lands in reliance on exist-

ing law and was engaged in removing and appropriating oil there found. The Government brought suit against the defendant to recover the land and for an accounting in respect of the oil so removed. This Court held that the withdrawal orders were valid as an exercise of a long-established practice on the part of executive officers which this Court found had been acquiesced in by Congress.

After issuance of the withdrawal orders involved in the *Midwest* case, however, Congress passed the Withdrawal Act of June 25, 1910, specifically authorizing withdrawals "in certain cases", and prescribing the manner in which withdrawals were to be made. This Court, in sustaining the earlier withdrawals, which were not in conformity with the Withdrawal Act, held that the Act showed no purpose to repudiate the withdrawals theretofore made. Said this Court:

> "The legislative history of the statute shows that there was no such intent and no purpose to make the act retroactive, or to disaffirm what the agent in charge had already done. The proclamation of September 27, 1909, withdrawing oil lands from private acquisition, was of far-reaching consequence both to individuals and to the public. It gave rise to much discussion, and the old question as to the authority of the President to make these orders was again raised. Various bills were introduced on the subject, and the President himself sent a message to Congress, calling attention to the existence of the doubt, and suggesting the desirability of legislation to expressly grant the power and ratify what had been done. A bill passed the House, containing such ratification and authorizing future withdrawals. When the bill came to the Senate it

was referred to a committee, and, as its members did not agree in their view of the law, two reports were made. The majority, after a review of the practice of the Department, the acquiescence of Congress in the practice, and the decisions of the courts, reported that the President already had a general power of withdrawal, and recommended the passage of the pending bill, inasmuch as it operated *to restrict* the greater power already possessed. Sen. Rep. 171 (61st Cong., 2d Session)." (Italics ours.)

The view indicated in the opinion of this Court, quoted above, that Congress intended that the Act of June 25, 1910, should *restrict* the greater power to withdraw lands already possessed by the President, had been also indicated by the House Committee on Public Lands, which, in reporting the Bill which became the Act of June 25, 1910, stated:

> "The President has authority to withdraw lands for certain purposes, but there is a difference of opinion as to the extent of that authority. Many claim this authority is as broad as that provided for in this bill; others contend to the contrary. No statute has been found expressly conferring this authority, and the extent thereof has not been settled by the Supreme Court * * *. In view of the conflicting opinions that exist as to the authority for past and future withdrawals, *it is deemed necessary to adopt a measure that will clearly define the extent of such authority.*" (House Report No. 983, 61st Cong. 2d Sess. Our italics.)

It seems plain that, after the enactment of the Act of June 25, 1910, the executive powers of withdrawal were limited to the public purposes therein specified.

The Act authorized withdrawals for "water-power sites, irrigation, classification of lands, or other public purposes." Only the latter of these purposes could possibly apply to the withdrawals alleged to have been effected in this case. It seems obvious that the term "other public purposes" refers to other purposes authorized by law which are of a public character. If Congress had authorized the Secretary (or the President) to take steps to regulate the production of oil in the United States (which it has not, and could not do) then it might be argued with some plausibility that an order withdrawing public lands from prospecting for the claimed purpose of preventing over-production of oil would be for a public purpose within the terms of the Act of June 25, 1910.

The sole authority over oil production vested by law in the Secretary (or the President) is to be found in the Act of February 25, 1920, which was enacted to release lands for prospecting which, as Senator Smoot pointed out (*ante*, pp. 9-10) had been locked up by executive withdrawals for twelve years. Surely only the clearest delegation of discretion to suspend the operation of this Act should be recognized as authorizing the executive department to again lock up in withdrawals the very lands which Congress intended to release.

The majority opinion in the court below (R. 32) further relies on the decisions of this Court in *Wilcox v. Jackson*, 13 Pet. 598, and *Wolsey v. Chapman*, 101 U. S. 755. These cases related to actual withdrawals of public lands, made long prior to passage of the Act of June 25, 1910, and were, moreover, cases where lands were held in a state of reservation for a purpose authorized by law or in order that Con-

gress might act in a legislative capacity. None of these entirely different considerations is involved in this case. There has been, here, no withdrawal or withholding of land from disposal until Congress can pass further legislation, but rather an attempt by the Secretary to suspend part of an Act of Congress because of conditions which he concludes have changed since the Act was passed.

The Court of Appeals failed altogether to give effect to the opinion of this Court in *Work v. United States, ex rel. Mosier*, 261 U. S. 351. In the *Mosier* case a statute directed the Secretary to pay certain royalties accruing from leases of lands of minor Indian wards, over to the guardians of such Indians, unless the Secretary was satisfied that the moneys of the minors were being misused or squandered. Thereafter great quantities of oil were discovered on Indian lands and the royalties greatly exceeded anything anticipated when the statute was enacted. Secretary Work undertook, under regulations adopted by him, to pay only a certain percentage of the royalties to the guardians of minor lessors. This Court held that the Secretary was under a duty to administer the law as he found it and not as he believed in the light of changed conditions it ought to be. This Court said:

> "However desirable such regulations were, in view of the changed circumstances, we think they were in the nature of legislation beyond the power of the Secretary." (261 U. S. 351, 360.)

The rule that exective officers must reasonably construe Acts of Congress and give effect thereto has been repeatedly applied by this Court. *Work v.*

*United States, ex rel. McAlester-Edwards Coal Co.*, 262 U. S. 200; *Stockley v. United States*, 260 U. S. 532; *Payne v. Central Pacific R. Co.*, 255 U. S. 228; *Lane v. Hoglund*, 244 U. S. 174; *Noble v. Union River Logging R. Co.*, 147 U. S. 165.

3. THE TRIAL COURT PROPERLY ISSUED A WRIT OF MANDAMUS UNDER THE FACTS IN THIS CASE.

In *Work v. United States, ex rel. Rives*, 267 U. S. 175, this Court said:

> "There is a class of cases in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator in such cases does not ask for a decision any particular way but only that it be made one way or the other. Such are United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638, 62 L. ed. 914, 38 Sup. Ct. Rep. 408, and Interstate Commerce Commission v. United, States, 224 U. S. 474, 56 L. ed. 849, 32 Sup. Ct. Rep. 556."

As Mr. Justice Van Orsdel said in his dissenting opinion—

> "This is not an action to mandamus the President * * *. The President, so far as I am able to observe, has had nothing to do with this case. The case grew out of orders originated in the Land Department, based upon newspaper rumor; and the action here is to compel the Secretary of the Interior and the Commissioner of the General Land Office to perform purely administrative duties imposed upon them by law." (R. 41.)

The Oil Leasing Act, as has been fully shown herein, was passed to afford opportunities to citizens to prospect for and discover minerals upon the public domain. The Interior Department itself has recognized that these rights constitute property (*Haynes v. Smith*, 51 L. D. 208), and no one will deny that such rights are valuable.

The Oil Leasing Act was passed to encourage citizens to go upon the public domain and expend their time and money and to provide (Sec. 35) additions to the reclamation, public roads and school funds of the Western States, and in refusing to entertain further applications, the Secretary has completely nullified these purposes. Surely only the clearest delegation of discretion to suspend the operation of the Act should be recognized as authorizing the Interior Department to suspend the development of the very lands which Congress in passing the Act intended to release in order *to promote* development of their mineral contents.

That the States which suffered from the administrative withdrawals which preceded the enactment of the Oil Leasing Act are quick to resist an attempted executive repeal of the statute which brought them relief from early executive withdrawals is shown by the intervention in the Court below of the counsel for four Western States as *amici curiae* (R. 25).

## VI.

## Conclusion.

Since the action of the Secretary in this case was unwarranted by the terms of the Oil Leasing Act and went far beyond the limits of his discretion, to the

detriment of this petitioner, and since the Secretary's action results in nullifying part of an Act of Congress and restores a situation which Congress intended to remove when it passed the Oil Leasing Act, we submit that the issuance of a writ of mandamus as prayed for was fully warranted, and that the questions involved are of such general importance and substantial nature that the writ of certiorari, now sought, should be granted.

There is no conflict between courts of different jurisdictions on the questions involved, and none can arise since proceedings raising the questions can be brought only in the District of Columbia. However, two judges of the Supreme Court of the District, and one of the three judges of the Court of Appeals have found that the petitioner's suit is well founded, and the issues are such as should be settled by this Court.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, that a writ of certiorari should be granted, and that this Court should review the decision of the Court of Appeals of the District of Columbia and reverse the same.

Respectfully submitted,

HOMER HENDRICKS,
DONALD V. HUNTER,
JAMES C. SHEPPARD,
*Counsel for Petitioner.*

January, 1931.

## APPENDIX.

UNITED STATES GEOLOGICAL SURVEY BULLETIN NO. 623, "PETROLEUM WITHDRAWALS AND RESTORATIONS AFFECTING THE PUBLIC DOMAIN," P. 440.

(TYPICAL WITHDRAWAL ORDER)

"WITHDRAWAL OF SEPTEMBER 14, 1916.

September 8, 1916.

The Honorable,
The Secretary of the Interior.

Sir:

Field investigations by the Geological Survey indicate that the lands in south-central Montana hereinafter listed contain deposits of oil and gas. As shown on the General Land Office records some of the lands within this favorable area have been patented to individuals and to the Northern Pacific Railroad Company. For that reason such patented lands and school lands in Secs. 16 and 36 are not listed in the order of withdrawal. The lands embraced in homestead entries upon which final certificates have not yet issued and unpatented railroad lands are included in the order, as they fall within the purview of the act of July 17, 1914 (38 Stat., 509). As these lands are not now in petroleum withdrawal the following order (Petroleum Reserve No. 49, Montana No. 4), involving 24,587 acres, is recommended for submission to the President for appropriate action.

Respectfully,

GEO. OTIS SMITH,
*Director.*

Sep-9 1916

Respectfully referred to the President with favorable recommendation.

ALEXANDER T. VOGELSANG,
*Acting Secretary.*

## ORDER OF WITHDRAWAL

### Petroleum Reserve No. 49, Montana No. 4

Under and pursuant to the provisions of the act of Congress approved June 25, 1910 (36 Stat., 847), entitled 'An act to authorize the President of the United States to make withdrawals of public lands in certain cases,' as amended by act of Congress approved August 24, 1912 (37 Stat., 497), and subject to the provisions of the act of Congress approved July 17, 1914 (38 Stat., 509), entitled 'An act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals,' it is hereby ordered that the lands hereinafter described be, and the same are hereby, withdrawn from settlement, location, sale, or entry, and reserved for classification and in aid of legislation.

(Here follows detailed description of lands withdrawn.)

WOODROW WILSON,
*President.*

14 September 1916."